

***DISTRICT OF MAINE***

***Docket No. 01-295-P-H***

The Defendant's Motion implicates Fed. R. Civ. P. 55(c), pursuant to which "[f]or good cause shown the court may set aside an entry of default[.]" This court has observed: "Unlike the more stringent standard of 'excusable neglect' applied to a motion for relief from *final* judgments pursuant to Federal Rule of Civil Procedure 60(b), the 'good cause' criterion applied to motions to set aside entries of default is more liberal, setting forth a lower threshold for relief." *Snyder v. Talbot*, 836 F. Supp. 26, 28 (D. Me. 1993) (citations omitted) (emphasis in original). "This lower threshold is justified by the fact that an entry of default is a clerical act, and not a final judgment issued by the Court. It is also in keeping with the philosophy that, if at all possible, actions should be decided on their merits." *Id.* at 28-29 (citations omitted).

The First Circuit has identified several factors relevant to a determination whether such a motion should be granted: "(1) whether the default was willful; (2) whether setting it aside would prejudice the adversary[:]; (3) whether a meritorious defense is presented; (4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; and (7) the timing of the motion." *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 503 (1st Cir. 1996).

At bottom, a district court should grant a motion to set aside an entry of default "upon a showing of reasonable justification, while resolving all doubts in favor of the party seeking relief from the entry of default." *Snyder*, 836 F. Supp. at 29 (citation and internal quotation marks omitted).

## II. Background

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decision to an Article III judge. *Conetta v. National Hair Care Ctrs., Inc.*, 236 F.3d 67, 74 (1st Cir. 2001). In an abundance of caution, I therefore issue a recommended decision on the Defendant's Motion.

Storms filed the instant complaint on December 13, 2001, making service upon Benthic's duly appointed agent on January 22, 2002. *See* Complaint for Damages for Personal Injuries ("Complaint") (Docket No. 1) at 1; Affidavit of Francis M. Jackson (Docket No. 4) ¶ 1. Benthic's answer was due on February 11, 2002. *See* Defendant's Motion at 1; Plaintiff's Memorandum in Opposition to Motion for Relief from Default, etc. ("Plaintiff's Opposition") (Docket No. 10) at 1. On February 13, 2002 Storms filed a motion for entry of default; no answer having then been filed, the Clerk's Office entered default the next day. *See* Plaintiff's Motion for Default (Docket No. 3) and endorsement thereon. On February 20, 2002 Benthic filed its tardy answer along with an opposition to the motion for default supported by an affidavit. *See* Answer; Defendant's Opposition to Plaintiff's Motion for Default (Docket No. 5); Affidavit of Seth S. Holbrook in Support of Defendant's Opposition to Motion for Default (Docket No. 6). Evidently realizing that its opposition was filed too late (default having already been entered), Benthic the next day filed the instant motion to set aside the default. Defendant's Motion at 1.

Benthic explains (via affidavit of its counsel, Seth S. Holbrook) that (i) Holbrook's office received the Complaint on January 31, 2002, (ii) Holbrook neglected to contact plaintiff's counsel or submit an answer before February 11 in part because he was not sure he had the last page of the Complaint; (iii) Holbrook was on a planned vacation from February 14-18, during which time it came to his attention that plaintiff's counsel was seeking a default; and (iv) to Holbrook's knowledge, plaintiff's counsel did not contact any of Benthic's representatives before filing the motion for default. Affidavit of Seth S. Holbrook in Support of Defendant's Motion To Set Aside Default, attached to Defendant's Motion, ¶¶ 4-5, 7-9.

Storms counters (via affidavit of his out-of-state counsel, James J. Rosenberger) that (i) after serving Benthic's registered agent, Allen MacEwan, Rosenberger left MacEwan two lengthy voice

mails indicating that he had not yet received an answer or seen an appearance entered despite the rapidly approaching deadline; (ii) Rosenberger ultimately spoke to MacEwan, who indicated that he had forwarded the summons and Complaint to Benthic's insurance carrier shortly after receiving it and had as yet received no instructions from the carrier that he (MacEwan) was to represent Benthic in the matter; and (iii) Storms incurred time and expense obtaining the order of default. Affidavit of Counsel in Response to Defendant's Motion To Vacate ("Rosenberger Aff.") (Docket No. 9).

### **III. Analysis**

With this as backdrop I proceed to the seven factors the First Circuit has identified as relevant in the context of a motion to set aside entry of default:

1. **Willfulness of Default; Nature of Explanation for Default.** Storms characterizes Holbrook's conduct in this case as "more closely resembl[ing] gross neglect or even a willful failure to act than any form of excusable neglect[.]" Plaintiff's Opposition at 3. I am unpersuaded that Benthic's conduct was "willful" in the sense that it was tantamount to a deliberate default. *See, e.g., Conetta*, 236 F.3d at 75 ("A layman's misunderstanding of the law, even a law firm's careless handling of documents, might well permit a finding of good cause on these facts. But we share the district court's view that a company's president cannot deliberately ignore a lawsuit and then claim to have acted in good faith."). On the other hand, the excuse proffered is "good" only in the sense that, apparently unbeknownst to Benthic, its insurer retained counsel who was surprisingly careless in defending its case. Holbrook had ample time to have satisfied himself that he had a complete copy of the Complaint and to have timely filed Benthic's answer before commencing his planned vacation. Instead, he left for vacation shortly after the answer was due without having bothered to move for an extension of time, contact opposing counsel or even make a simple inquiry concerning whether his copy of the Complaint was complete. On the whole, these factors tilt in Storms' favor.

2.     **Prejudice to Adversary.** Storms can identify only one respect in which he was prejudiced as a result of Benthic's tardy filing of its answer: that he incurred expenses in bringing a motion for default. *See* Rosenberger Aff. This (presumably *de minimis*) expense is not the type of prejudice that counsels in favor of denial of a motion to set aside a default. *See Snyder*, 836 F. Supp. at 30 ("[P]rejudice cannot be inferred merely from the passage of time, but, instead, relates to whether 'witnesses have died,' 'memories have dimmed beyond refreshment,' a 'discovery scheme has been thwarted,' or 'evidence has been lost' during the time that elapsed from a party's default.").

3.     **Existence of Meritorious Defense.** Storms contends that Benthic makes no showing of a meritorious defense inasmuch as it fails even to argue the point. Plaintiff's Opposition at 4. In response, Benthic tenders a belated argument in its reply memorandum and submits a new affidavit of Holbrook addressing the issue. *See* Defendant's Reply to Plaintiff's Opposition to Motion for Relief from Default (Docket No. 11); Affidavit of Seth S. Holbrook in Support of Defendant's Reply to Plaintiff's Opposition to Motion for Relief from Default (Docket No. 12). Storms moves to strike this affidavit, *see* Motion To Strike; however, I need not consider the new Holbrook affidavit (or related argumentation in the reply memorandum) inasmuch as Benthic on February 20 filed a belated answer. That answer, in itself, suffices for purposes of a Rule 55(c) motion to put the issue in play. *See, e.g., Kingvision Pay-Per-View Ltd. v. Niles*, 150 F. Supp.2d 188, 190 (D. Me. 2001) ("[A]lthough Defendant Niles does not argue any defenses in his Motion to Set Aside Default, in the filing entitled both 'Motion for Entry of Dismissal' and 'Answer,' Defendant Niles not only denies any wrongdoing, but also he alleges that his codefendant, Michael Martin, is entirely at fault for any malfeasance."). The Motion To Strike accordingly is moot.<sup>4</sup>

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<sup>4</sup> I nonetheless caution counsel not to repeat or emulate this approach to litigating a motion to set aside a default. Apparently coincidentally, counsel in this case timely filed a document (the answer) that preserved the point in issue. Counsel nonetheless would be well-advised to make all relevant arguments and file all necessary supporting documentation in the first instance when bringing such a  
(continued on next page)

Turning to the substance of this factor, “[t]he ‘meritorious defense’ component of the test for setting aside a default does not go so far as to require that the movant demonstrate a likelihood of success on the merits.” *Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989). “Rather, a party’s averments need only plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense.”). *Id.* Benthic’s answer does so. Storms files a complaint in admiralty asserting that he was injured while employed as a seaman aboard a vessel owned and operated by Benthic. *See generally* Complaint. Benthic, *inter alia*, denies that Storms was injured while in the service of the vessel. *See* Answer/Affirmative Defenses. This would be a cognizable defense if proved, favoring set-aside of the entry of default.

4. **Good Faith of Parties.** Neither party suggests that the other has acted in bad faith, nor is there any evidence that either side has.

5. **Amount of Money Involved.** Neither the Complaint nor any other document filed to date makes clear how much money is at stake in this case.

6. **Timing of Motion.** Benthic filed its proposed answer nine days late and the instant motion the following day. No great delay is involved, militating in favor of granting the Defendant’s Motion. *See, e.g., Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) (“The lenient standard of Rule 55(c) for determining whether to relieve a party of a default was simply not applied in this case. Had it been, it is evident that a ten-day delay in submitting an amended answer to a complaint amended nearly one year after it was first answered would not have led to a default judgment.”).

Stepping back from the detail of the seven factors, I am mindful of this court’s admonitions that “if at all possible, actions should be decided on their merits” and that a motion to set aside the entry of default should be granted “upon a showing of reasonable justification, while resolving all doubts in

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motion.

favor of the party seeking relief from the entry of default.” *See Snyder*, 836 F. Supp. at 29. While the excuse for tardiness offered in this case is poor, the brevity of the delay, lack of willfulness or bad faith on the part of Benthic, existence of potentially meritorious defenses and lack of prejudice to Storms all counsel in favor of a determination that the clerical default entered against Benthic should be set aside.

#### IV. Conclusion

For the foregoing reasons, I recommend that the Defendant’s Motion be **GRANTED**.<sup>5</sup>

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.*

Dated this 21st day of March, 2002.

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David M. Cohen  
United States Magistrate Judge

STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-295

STORMS v. BENTHIC FISHING CORP  
Assigned to: JUDGE D. BROCK HORNBY

Filed: 12/13/01

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<sup>5</sup> I note that adoption of this recommended decision would moot another pending motion, that of Storms to extend time to file proof of damages for entry of judgment. *See* Motion for Extension of Time for Entry of Judgment (Docket No. 13).

Demand: \$0,000                      Nature of Suit: 340  
Lead Docket: None                  Jurisdiction: Federal Question  
Dkt# in other court: None

Cause: General Maritime Law and Jones Act

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